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IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

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Appellants,

v.

COMMONWEALTH OF MASSACHUSETTS, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF STATE OF WASHINGTON AS AMICUS IN SUPPORT OF APPELLANTS

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QUESTIONS PRESENTED

The three-judge district court held that the Census Clause of the Constitution (Art. I, § 2, Cl. 3) and the Census Act (13 U.S.C. § 141) permit the Secretary of Commerce to include federal personnel stationed abroad (and their dependents) in the state population totals on which the apportionment of Representatives is based. However, the court held that the Secretary's manner of doing so following the 1990 census was arbitrary and capricious, in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), because he did not furnish an adequate justification. The questions presented are:

1. Whether judicial review of the apportionment of Representatives, based on the census including federal personnel stationed abroad, is barred by virtue of the political question doctrine, the APA's exceptions for situations in which "statutes preclude review" and "agency action is committed to agency discretion by law," 5 U.S.C. 702(a), and the inapplicability of the APA to the President.

2. Whether, if judicial review is not barred the inclusion of federal personnel stationed abroad was arbitrary and capricious.

3. Whether, if the district court correctly found that the Secretary's determination violated the APA, it properly ordered appellants to effect a new apportionment of Representatives with the personnel abroad thrown out of the underlying census count, rather than remanding the matter to the Secretary for further proceedings.

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INTERESTS OF AMICUS WASHINGTON

The State of Washington participates herein to protect the nine United States House of Representatives seats to which it is "entitled" (2 U.S.C. § 2a) under the Certificate of Entitlement

issued by the Clerk of the House following the 1990 Census.[1] The order below transfers one of these seats to Massachusetts and also reduces by one the number of Washington's presidential electors.

Washington also acts to protect the rights of 922,819 United States citizens who, because they were serving their country overseas on the day of the census, have been ordered treated as nullities for constitutional apportionment purposes by the district court.

Finally, Washington acts to protect the rights of its citizens whose share of representation in the House of Representatives would be diluted (reduced by 11%) by the lower court's order reducing the Washington delegation from nine to eight.

A. Washington's Interest in Retaining Nine House Seats and Declaring the Process Final

"The 1990 census revealed that the population of certain States . . . had increased more rapidly than the national average . . . [which] caused 8 states to gain . . . additional seats in the House of Representatives and 13 states to lose an equal number." *U. S. Dep't of Commerce v. Montana*, No. 91-860, slip. op. at 2 (U.S. Mar. 31, 1992). Washington, a rapidly growing state, gained one seat (to nine) and Massachusetts, a state of relative decline, lost one seat (to ten). *Montana*, slip op. at 2, nn.4, 5.

Massachusetts (belatedly) filed this action in an attempt to reverse or delay the effects of these population changes on its congressional delegation.

Because Washington's ninth seat was the last seat allocated under the 1990 apportionment (number 435), two of the legal challenges filed by states losing seats have sought the seat gained by Washington.[2]

In this action the United States District Court for the

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[1] Washington's Certificate dated January 16, 1991 is appended as Appendix A.

[2] First considered by this Court was *United States Department of Commerce v. Montana*, No. 91-860 (U.S. Mar. 31, 1992).

District of Massachusetts issued an order excluding from the census for apportionment purposes, the approximately 922,819 federal employees serving overseas on the census date, and directing the Clerk to issue new Certificates of Entitlement with the effect of taking a seat from Washington, and giving it to Massachusetts. Washington has an interest in reversing that decision, in order to retain its nine House seats (and the presidential electors based on House and Senate delegations). Washington also advocates the strong public interest in finality of the apportionment process.

In Washington, as in a majority of states,[3] redistricting into congressional, and intertwined states districts, is now final (as required by the Washington Constitution) and its Redistricting Commission is no longer in operation.

Preparations for the 1992 congressional and other elections are already in progress, both by the State and by the various candidates. Candidates have declared and filed public disclosure and financial reporting statements.

The Massachusetts court order would have the probable effect of making it impossible for Washington to conduct its elections in accordance with its laws.[4]

B. Washington's Interests Include the Constitutional Rights of Affected Citizens Serving Overseas

Of arguably greater importance, Washington argues herein on behalf of the over 922,819 citizens declared nullities for apportionment by the decision below. Approximately 21,249 of those citizens are Washingtonians by selection of Washington as a "home of record" when entering government service. However, the decision below denied representation to all citizens who happened to be serving their country in an overseas

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[3] Only nine states are still redistricting. *See* App. B.

[4] Massachusetts has previously suggested (Brief opposing stay, p. 22) Washington should conduct elections from old districts. Those districts would be unconstitutional under *Wesberry v. Sanders*, 376 U.S. 1 (1964), standards.

location--often at the order of the President as Commander-in-Chief--on the day of the census.

Washington speaks for the rights of its citizens so situated and those of all states. Neither the United States nor Massachusetts even purports to do so. The court below disregarded the rights of all such citizens in its rush to add back a Massachusetts seat. It will be demonstrated, infra at p. 24, that denying representation under such circumstances is unconstitutional as a violation of the equal protection concepts of the Fifth Amendment. Totally refusing to count these citizens has the effect in this case, of reducing the Washington delegation to eight, thus reducing the "share of a representative"[5] for both the military personnel in question and for other citizens of the state.

STATEMENT OF THE CASE

The Census of the United States was conducted as of April 1, 1990. 13 U.S.C. § 141(a). Nearly nine months before (July 31, 1989), however, all states had been advised of the final decision of Commerce that overseas federal employees would be counted in the 1990 Census. J.A. 511-512.

Neither Massachusetts nor any representative complained or moved to legally challenge this decision. Indeed, the House, on June 26, 1990, passed on consent HR 4903 to prohibit census exclusion of military personnel stationed outside the United States and to direct "home of record" be used in counting. There was no recorded dissent from Massachusetts' representatives. 136 Cong. Rec. H 4195-4197.

It seems likely that such a bill would have passed, were it not for the decision of the Secretary of Commerce to order the counting of the overseas citizens and the later determination to utilize the "home of record." J.A. 919-920. The conclusion, and its reasoning were communicated to Congress and the public on July 23, August 7, and September 11, 1990. J.A. 925, 931-32.

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[5] "Share" is one measure of fairness in apportionment. *Montana*, slip op. at 11-2, defined at n.28.

On December 26, 1990, the census results, including overseas federal employees were reported to the President as required by the statute. On January 3, 1991 (the first day of the 102nd Congress), the President transmitted to Congress a report showing the results of the 1990 Census, and the number of representatives to which each state was entitled.

On January 16, 1991, the Clerk of the House of Representatives transmitted to each state a Certificate of Entitlement to that number of representatives as required by 2 U.S.C. § 2a(b). Massachusetts is entitled to ten, and Washington to nine under their respective Certificates. (Washington's certificate is attached as Appendix A.)

Nearly two years after the decision to include citizens temporarily overseas, and four months after receiving its Certificate, Massachusetts filed this action on May 12, 1991. Washington moved to participate as an amicus, specifically noting its refusal to waive sovereign immunity to be sued and that it was an indispensable party in any suit to take a Washington House seat.

Washington later argued amicus that it was unconstitutional to deny representation of citizens whom the United States had ordered temporarily out of country, describing the Massachusetts theory as "one man no vote."

On summary judgment, the Massachusetts court required the results of the census be recomputed by the Executive to exclude government employees temporarily overseas on April 1, 1990. These are mostly military, though thirty agencies have such employees. The Executive (President) was ordered by the Massachusetts court to submit a new statement to Congress, showing the number of representatives to which each state would be entitled if these counts are excluded. The court also ordered the Clerk of the House to "send the executive of each state a recertification of the number of Representatives to which such state is entitled . . .."[6] J.S. App. 95a.

The parties below, which did not include Washington, had

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[6] This relief, ordering the Clerk to issue new Certificates, was not requested in Massachusetts' Complaint. Washington is an indispensable party in any suit to change its certificate.

stipulated that absent the inclusion of those federal employees, Washington would be entitled to only eight representatives. While Washington does not concede this is true, it is the potential loss of one of its House seats that prompts participation here.[7]

These orders of the court below were stayed by this Court on March 27, 1992.

The Washington Redistricting Process is Final

The Certificate of Entitlement to nine House seats was transmitted to the Washington Redistricting Commission. Wash. Const. art. II, § 43, amend. 74.

The Commission redistricted Washington into the nine United States House districts (and intertwined state legislative districts). The Redistricting Plan was completed and filed on January 1, 1992. It is now final. Wash. Rev. Code § 44.05.100 (1983). The Washington Legislature, like the Redistricting Commission, is now out of session.

Washington's elections system, including its participation in the nominating process for United States President, has proceeded. Candidates for federal, state and local offices have commenced organizing, raising and spending money (and filing Public Disclosure Reports). The caucuses of the major political parties were held on March 3, 1992. These are the first level of selection of delegates to the national conventions.

Washington has proceeded in good faith following the Statement by the President and issuance of its Certificate of Entitlement by the Clerk of the United States House, both confirming entitlement to nine congressional seats (and districts).

Other states have acted similarly. As of the filing of this Brief over thirty-four states had completed redistricting based on the Census results and Certificates of Entitlement. Seven more

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[7] Washington is willing to intervene on remand to contest the factual basis for the total exclusion, and establish correct populations. Note too an "adjustment" to the Census as sought in *New York v. United Stated Department of Commerce*, 713 F. Supp. 48 (1989) (trial pending) would add over 100,000 to Washington including this case.

(with a single House seat) have done legislative redistricting. They have relied on the Census results all have assumed were final. *See* App. B.

SUMMARY OF ARGUMENT

I. A. The Constitution gives Congress express authority to direct the conduct of the decennial census. U.S. Const. art. I, § 2, cl. 3. Congress has delegated this authority to Commerce which is to conduct the Census "in such form and content as he may determine . . .." 13 U.S.C. § 141(a). The Census is statutorily required to be reported to the President on a specific date (this decade, Dec. 26, 1990). 13 U.S.C. §141(b).

The President is statutorily required to report to Congress the Census and the apportionment of House seats to states on the first day of Congress (or within one week). 2 U.S.C. § 2a(a). This was done, as required, on January 3, 1991.

B. Thereafter, the apportionment, including issuance of Certificates of Entitlement to each state, is exclusively a matter for Congress. The district courts had no authority to interfere, especially where, as here, the Congress (House Clerk) properly issued Certificates to each state on January 16, 1991 as required by statute. 2 U.S.C. § 2a(b).

The court order below, directing new Certificates be issued, is also improper because predicated on the Administrative Procedure Act (Act). That Act provides cause of action neither against the President, nor against Congress which is specifically exempted. 5 U.S.C. § 701(a)(1)(A).

The statute under which the House Clerk acted does not authorize any change in Certificates once issued. 2 U.S.C. 2a(b). Legislative history confirms this conclusion. Only on one occasion have Certificates been changed once issued, and that required an explicit act of Congress.

II. Here, the Secretary of Commerce' decision to count overseas military, and to use "home of record" is clearly within the delegated discretion, and indeed is required. Congress both encouraged and directed these decisions (and probably would have required it by law, had the Secretary not so acted).

The court below either overlooked, or disregarded

important parts of the Administrative Record which supported (mandated) the Secretary's decision. This Record importantly included a study by Congress itself (Congressional Research Service), analyses by staff at the census and Secretary level, and direct Congressional input.

The necessary conclusion from the Administrative Record was that counting the overseas military was practical and appropriate, and that "home of record" provided the most accurate data and conforms closely to the usual residence of the Census.

Congress' and the states' treatment of these same individuals for voting parallels the methodology chosen by Commerce; these persons generally vote at the same place as their "home of record" The Washington State Constitution protects the right to do so. Wash. Const. art VI, § 4. The federal Overseas Citizens Absentee Voting Act provides similar protections. 42 U.S.C. §§ 1973ff-1973ff-6.

III. The court order that such persons be treated as nullities for apportionment purposes, because of their serving the country overseas, violates Constitutional Rights of these citizens and of the states. The equal protection component of the Fifth Amendment prohibits the federal government from such discrimination. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Buckley v. Valeo*, 424 U.S. 1 (1976). Strict scrutiny is the standard to apply, and Massachusetts has shown no compelling reason for this discrimination.

The result also violates the right of the states to have their citizens counted. Article 1, Section, 2 Clause 3 was written to count for apportionment all "persons," expressly to be inclusive of all inhabitants. 1 Max Farrand, *The Records of the Federal Convention of 1787* 35 (1911).

The first Census Act spoke of counting "inhabitants." 1 Stat. 101 (1790). As Madison had noted in 1787, when discussing qualifications for House membership, inhabitants "would not exclude persons absent occasionally for a considerable time on public or private business." 2 *Id.* at 217.

ARGUMENT

I. The 1990 Census and Apportionment of Representatives is Final, and is Not Now Subject to Review

A. The Manner of Conduct of the Census is Constitutionally Committed to Congress. Once Reported to Congress it is Final

Article I, Section 2, Clause 3 directs that the "enumeration shall be made . . . in such manner as [Congress] shall by law direct." The Census was conducted by Commerce under the broad delegation of authority in 13 U.S.C. § 141(a). The Statement of the President showing the census results and the resulting apportionment was reported to Congress on January 3, 1991 as required by 2 U.S.C. § 2a(a).

Once the President's Statement is received in Congress, any review of, or change in the census or apportionment is exclusively committed by Constitution and statute to Congress.[8]

A federal court has no jurisdiction or authority to order Congress to change its own apportionment--where, as here, there is alleged no constitutional violation.[9] This distinguishes Massachusetts' case from the challenge to apportionment in the recent *Montana* case. *U.S. Dep't of Commerce v. Montana*, No. 91-860, slip op. at 2 (U.S. Mar. 31, 1992). There, a constitutional violation was alleged which called for this Court's interpretation of the constitutional provisions applicable. The *Montana* claim involved "determining that specific congressional

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[8] "The Constitution squarely places sole responsibility for this fundamental function of government (apportionment of House seats) on the Congress." *Tucker v. U.S. Dep't of Commerce*, No. 91-2051, slip op. at 16 (Ripple, J., concurring) (7th Cir. Mar. 16, 1992).

[9] Massachusetts' claim below that the inclusion of the overseas military violated the Constitution was rejected by the district court. "Thus we do not find persuasive plaintiff's argument that the Secretary's overseas census decision was unconstitutional on its face." J.S. App. 81a. Massachusetts did not appeal that ruling.

action does not violate the Constitution" and thus "turns on the proper interpretation of the relevant constitutional provisions." *Montana*, slip op. at 19.

The statutory scheme here, with explicit deadlines contained in 2 U.S.C. § 2a requires the conclusion that the census and apportionment are intended to be final upon the expiration of those dates. Massachusetts inexcusably waited far too long to bring its challenge. It will be further indicated below why that challenge must fail.

There are many policy reasons supporting Congress' decision to make the process final at a specified date. There can be no doubt of Congress' constitutional responsibility for conducting the census and plenary authority to make it final. *Baldridge v. Shapiro*, 455 U.S. 345 (1982).

This finality in congressional apportionment is of great public interest because it would be harmful and disruptive to permit continuous challenges to the highest representative political authority. Both federal and state courts recognize that there should be finality in political processes, especially procedures relating to elections, *e.g. Morgan v. United States*, 801 F.2d 445, 450 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 911 (1987) ("The pressing legislative demands of contemporary government have if anything increased the need for quick, decisive resolution of election controversies").

Appendix B shows the number of states that have concluded redistricting (or have one seat (41)). Changes to the Census or apportionment results *could* impact all states, though Washington is most directly affected herein.

To take a seat from Washington now would be especially disruptive, requiring redistricting efforts to start again. In the interest of preserving the integrity and finality of the apportionment process, the Clerk should not now be ordered to revoke or modify any state's Certificate. These public consequences justify reversing the district court's order. *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

It is also important to consider that other challenges could follow Massachusetts'; as other states find elements of the census methodology that, if changed, could enure to their benefit in a number sufficient to reclaim a "lost" House seat. Such problems

are foreseeable, and justify Congress in setting deadlines, after which, apportionment is irrevocable.

B. The Court Improperly Ordered the House to Change Each State's Certificate

1. The APA Provides No Cause of Action Against the President or Clerk

The court below relied upon the Administrative Procedure Act (APA), as the sole cause of action to support the relief below.[10] However, the APA does not apply to the Clerk of the United States House, nor to the President–both of whom were ordered to perform affirmative acts as integral parts of the relief below.

Neither of these defendants is an "agency" within the meaning of the APA. *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991), reached the specific conclusion the President was not an "agency." The Clerk of the House is also not subject to APA review. Under 5 U.S.C. 701, "Agency . . . does not include (A) the Congress . . ." 5 U.S.C. § 701(a)(1)(A).

The APA does not support the relief granted against the President or House Clerk.

2. The Clerk Lacks Statutory Authority to Revoke or Modify Certificates of Entitlement

2 U.S.C. § 2a(b) provides that the Clerk *shall* issue a Certificate within fifteen days after receiving apportionment figures from the President. It does not authorize the revocation or modification of a Certificate once it has been issued.

The word "shall" in statutory parlance is mandatory language. *Board of Pardons v. Allen*, 482 U.S. 369, 374 (1987).

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[10] The opinion concluded: "we . . . ALLOW plaintiffs' motion for summary judgment as to the overseas census claim grounded upon a violation of the Administrative Procedure Act." J.S. App. 84a. As noted, (*infra*, n.9) the constitutional claim was denied.

The statute even goes on to specify who "shall" perform this duty if the Clerk does not:

> In case of a vacancy in the office of the Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives; and in case of vacancies in the offices of both the Clerk and the Sergeant at Arms, or the absence or inability of both to act, such duty shall devolve upon the Doorkeeper of the House of Representatives.

2 U.S.C. § 2a(b).

Where statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive. *United States v. Turkette*, 452 U.S. 576, 580 (1981). A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. *Perrin v. United States*, 444 U.S. 37, 42 (1979).

The plain language of 2 U.S.C. §§ 2a(a) and 2a(b) indicates that the Clerk must issue Certificates in accordance with the President's Statement and has no authority to revoke or modify an issued Certificate. The legislative history of the statute confirms that the Clerk cannot, without explicit statutory authority, revoke or modify the Certificate.

Each state is "entitled" to the number of seats shown in the President's Statement and indicated in its respective Certificate until the taking effect of a subsequent reapportionment. 2 U.S.C. §§ 2a(a), 2a(b). To interpret the statutes to allow the Certificate to be changed would render this "entitlement" language meaningless. It is in the nature of a vested right, upon which all states are entitled to rely in redrawing their congressional districts.

The vesting of each state's entitlement probably occurs at the time the President's Statement is filed with the Congress; surely it vests when the Certificate is actually issued and received.

The Clerk has no authority to revoke or modify a Certificate and may not be ordered to perform an act he has no authority to perform.

3. Legislative History Confirms That the Certificates of Entitlement are Irrevocable (Absent Congressional Action)

There is only one historical instance in which a state was denied a seat to which it was entitled according to a Certificate. An explicit act of Congress was required to take away the seat.

In 1941, Congress debated amendments to 2 U.S.C. § 2. The President had already reported the 1940 census results to the Congress and certificates had been issued. The result was explained on the Senate floor:

> [T]he statute made reapportionment by so-called major fractions final and conclusive and binding upon all concerned. The case was closed; the incident was finished; and the Clerk of the House so notified the States.

87 Cong. Rec. 8053 (1941) (Statement of Senator Vandenberg).

The method of apportionment was changed, and "equal proportions" accepted. However, a specific act of Congress was required to change the States' entitlement under already-issued certificates. The debate confirmed the general proposition of our argument here: unless Congress specifically acts, the Certificates are final. 87 Cong. Rec. 8078-83 (1941). Congress voted to specifically require new Certificates. Section 2b of the Act of November 15, 1941 provided as follows:

> (b) If before the enactment of this Act a certificate has been sent to the executive of any State . . . as in force before the enactment of this Act, the Clerk of the House of Representatives shall, within fifteen calendar days after the date of enactment of this Act, send a new certificate to such executive stating the number of Representatives to which State is entitled under this

section.

Pub. L. No. 87-291; 55 Stat. 761, 762 (1941) (originally codified as 2 U.S.C. § 2b).

Congress' action in 1941, and the legislative history surrounding it, confirms that a Certificate of Entitlement cannot be revoked or modified by the Clerk unless and until Congress enacts legislation to that effect. A court may not order the Clerk to perform beyond his statutory authority.

C. Whether to Change Congress' Certificates of Entitlement Apportioning Representatives Among the Several States is a Political Question

Massachusetts filed this action ultimately seeking an extra House seat. First, the President was ordered to make a new report to Congress providing eleven House seats for Massachusetts. Then the House Clerk was ordered to issue (all) new Certificates of Entitlement with Massachusetts' and Washington's changed.

Each of these steps involves reversing actions of the separate branches of government, which had long become final. The case clearly involves nonjusticiable political question(s).

This Court has said that:

> In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.
>
> The nonjusticiability of a political question is primarily a function of the separation of powers.

Baker v. Carr, 369 U.S. 186, 210 (1962) (citation omitted).

The Executive's final action occurred when the President certified the final census results of the 1990 Census, including states' apportionment, to the Congress on January 3, 1991 (the

first day of the 102nd Congress). 2 U.S.C. § 2a(a).

The Legislative Branch has also taken its final action. The Clerk of the House sent each state its Certificate of Entitlement on January 16, 1991. 2 U.S.C. § 2a(b). On their face, and by statute, these Certificates are final until the next decennial census and apportionment. In affirming dismissal of another challenge to the 1990 Census and apportionment, one judge noted:

> [I]n my view, to the extent that the plaintiffs seek a redetermination of the Congress' apportionment of the seats of the House of Representatives, this suit presents a nonjusticiable political question. *See Baker v. Carr*, 369 U.S. 186 (1962); *Coleman v. Miller*, 307 U.S. 433 (1939). The Constitution squarely places sole responsibility for this fundamental function of government on the Congress.

Tucker v. U.S. Dep't of Commerce, No. 91-2051, slip op. at 16 (7th Cir. Mar. 16, 1992) (Ripple, C.J. concurring).

It should be also noted that there are "policy choices and value determinations" tied to conduct of the census which are "constitutionally committed for resolution to the halls of Congress . . .." *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986). These decisions were, in turn, delegated to Commerce. Such issues do not lend themselves to judicial resolution.

A last observation of *Baker* is also relevant to the finality argument. "The political question doctrine, [is] a tool for maintenance of government order, [and] will not be so applied as to promote only disorder." *Baker*, 369 U.S. at 215.

Most states already redistricted, creating congressional districts intertwined with legislative and local districts, raising questions of when states may rely on finality of congressional and executive process. In Washington and other states, a change at this late date would disrupt the political process, probably making it impossible to conduct 1992 elections in accordance with statutory deadlines. If not dictating abstention, these considerations should support deferring to other branches.

II. The Secretary of Commerce Acted Within and in Accordance with Congress' Delegation of Census Authority

Congress has vested broad discretion in the Secretary of Commerce to conduct the census "in such form and content as he may determine . . ." 13 U.S.C. § 141(a). The Secretary acted within this discretion in deciding to include overseas federal employees, in the count for apportionment purposes. A predecessor made the same decision in 1970.[11] The court below necessarily rejected the argument that such inclusion violates the Census Act concluding the Secretary has such discretion. J.S. App. 81a, n.31.

Still, the court concluded that the Secretary's decision was an abuse of that discretion and issued a court order denying representation to those serving their country overseas. That decision not only offends traditional notions of representation,[12] but contradicts the intent of Congress. Congress' only explicit expressions of opinion or oversight directed the Secretary to implement such inclusion[13] (*see supra* p. 4 HR 4903 and *infra*

---

[11] *See Borough of Bethel Park v. Stans*, 449 F.2d 575, 581 (3rd Cir. 1971) (noting inclusion of overseas federal employees "was prompted by a recommendation of the House Subcommittee on Census and Statistics which demonstrated concern over the large number of Federal Government employees serving overseas at the time of the 1970 Census.")

[12] Contrast this with the counting of illegal aliens and convicts. *Infra* at 24. One Representative (Roberts) spoke of "a very serious problem . . . overseas among the military and Federal civil service . . . of feeling disenfranchised, of being second class citizens, not having access to the system in which they really want to participate." *Uniformed and Overseas Citizens Absentee Voting: Hearings on HR 4393 Before the Subcomm. on Elections of the Committee on House Administration, U.S. House of Representatives*, 99th Cong., 2d Sess. 39, 68 (1986).

[13] As noted in n.11, a similar decision in 1970 was prompted, in part, by similar direction from Congress.

pp. 18-19). When Congress provided for protection of the voting rights of these overseas federal employees (42 U.S.C. §§ 1973ff-1973ff-6), Congress adopted a procedure similar to that followed by the Census Bureau in counting these same persons. The Census Bureau did not act arbitrarily in allowing voters to be counted for apportionment purposes on a similar basis.

A. The Lower Court Ignored the Record Basis for the Decision to Use "Home of Record"

The lower court agreed the Secretary possesses broad discretion under both the Constitution and relevant statutes. J.S. App. 79a. The court concluded that the Secretary's decision was arbitrary and capricious solely because the Department of Defense (DOD) ultimately did not conduct a census of its employees concurrently with the originally scheduled national census. *Id.*, 75a.

The lower court's consideration of the Administrative Record stopped at DOD's December, 1989 decision not to undertake a separate census count. A.R. 787. This is the last record cite in the decision.

Given a fair reading this entire Record documents that the Secretary, and his staff, carefully considered whether or not to include overseas personnel and what data would be used. *See, generally*, A.R. 788-949, J.A. 811-12, 826-31, 834-35, 872-82, 919-21, 924-25, 931-32, 943-45.

A brief summary of the major elements of the Secretary's reasoned consideration of this question is appropriate here. Each piece of correspondence, memo, or report obviously documents more lengthy study and consideration:

- Extensive correspondence between Commerce and Congress considered whether, and how, to count those overseas. A.R. 830-33, 925-27, 931-47; J.A. 811-12, 830-31, 925, 931-32, 943-45.

- Staff memoranda analyzed these subjects: (a) counting overseas military comparing "home of record" vs. "last six months residence." J.A. 826-

829. (b) H.R. 4903 which required use of home of record data. A.R. 862. (c) the proposed use of home of record data in 1990 census. J.A. 920-921.

- Thirty-five page Congressional Research Service Report (Huckabee, *The 1990 Census: Including Foreign-Based Military and Civilian Personnel in the State Counts* (CRS Study)) dated June 20, 1990 analyzed three alternative data sources. A.R. 872-907; J.A. 872-82.[14] These are (1) home of record; (2) legal residence--six months duration; and (3) last duty station. The home of record is recommended as the preferred reliable data source.[15]

- Department staff recommendation (and approvals) articulated reasons to use home of record data: "We believe that the new 'home of record' data supplemented with additional information DOD plans to collect will satisfy our criterion that the best quality data be used for the 1990 census." J.A. 919.

- Staff memorandum advised the Secretary that the technical staff of the Census Bureau "believes that the Home of Record comes closest to the concept of the usual residence among the three data sources that DoD has available." J.A. 924.

- Finally, DOD agreed to assure that home of record data would satisfy Commerce' criterion for best

[14] Not all of the A.R. is included in the J.S., *e.g.*, 25 pages of appendices to this study were omitted.

[15] This study alone is probably sufficient record for the Secretary's decision--given the source was the same source of his delegated authority. *See Montana*, slip. op. at 8-13 (describing a National Academy of Sciences Report on apportionment methodology as one appropriate decisional basis.

quality data as "supplemented and improved by methodologies devised by technical experts who originally designed the overseas enumeration." J.A. 919-21, 925, 931.

The court below erred by failing to give deference to the Secretary's reconsideration and decision as documented in this record, in accordance with normal APA judicial review standards.

The legitimacy of our representative institutions depends upon the premise that all persons are treated as politically equal. The central census issue is how to provide the best possible numbers. The guidelines determined in advance by the Secretary, in cooperation with DOD, created the necessary environment for a decision free of the influence of any individual or group who may have a political, financial or other stake in the outcome. Not surprisingly, there was little (no) dissent from the Secretary's decision until this action.

Conversely, total exclusion of people who are entitled to be counted is the result of the decision below. Massachusetts (and the court below) ignores the most accurate numbers available and replaces these data with a zero. This is a misapplication of the principles of *Karcher v. Daggett*, 462 U.S. 725 (1983). A proper application of the constitutional principles to the overseas personnel counting issue is to give weight to the most accurate numbers possible under current methodology. The goal of providing equal representation in Congress is not served by denying the best available figures any validity whatsoever. *City of Newark v. Blumenthal*, 457 F. Supp. 30, 34 (D.D.C. 1978).[16] There is no dispute that there are numbers of American citizens temporarily overseas who are entitled to vote in the next election. Massachusetts would say--do not count any of these for representational purposes. This is not a rational solution to the problem, nor does it comport with the considered solution reached by the Executive Branch (with the prodding of the Legislative Branch which is constitutionally authorized to

[16] Cited with approval for this proposition in *Karcher v. Daggett*, 462 U.S. at 738.

"direct" the census).

B. Congress Encouraged and Directed the Secretary's Decision to Include Federal Overseas Personnel by "Home of Record"

This Court observed, in its recent decision, *U.S. Dep't of Commerce v. Montana*, No. 91-860, slip. op. (U.S. Mar. 31, 1992):

> Our previous apportionment cases concerned States' decisions creating legislative districts; today we review the actions of Congress. Respect for a coordinate branch of Government raises special concerns not present in our prior cases, but those concerns relate to the merits of the controversy rather than to our power to resolve it.

Montana, slip. op. at 17.

The lower court did not have the benefit of this admonition. Rather, the court below obliquely referred to this issue by concluding that the Secretary's reliance upon bipartisan expressions of congressional concern was not an "improper factor." J.S. App. 73a-75a. This is a far cry from judicial deference to considered decisions reached by separate but coordinate branches of government which resulted in the use of home of record data for apportionment in the 1990 Census.

As the Administrative Record demonstrates, the Secretary considered alternative data sources for use in counting overseas personnel and ultimately concluded that it would be consistent with his statutory responsibilities to use home of record data (with certain adjustments) for counting overseas personnel for the 1990 Census.

The record clearly shows a series of reasoned responses by the Executive Branch to criticism, comment and recommendations from the Legislative Branch exercising its oversight responsibilities. Such expressions of legislative will and of executive responses are entitled to deference by the Judicial Branch. As Mr. Chief Justice Taft observed in *Hampton*

& Co. v. United States, 276 U.S. 394, (1928):

> This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches insofar as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.

Id. at 406.

Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977) stated that the Judicial Branch should give deference to decisions made by other branches. *Id.* at 443, citing *United States v. Nixon*, 418 U.S. 683, 703, 711-12 (1974). *Accord Mistretta v. United States*, 488 U.S. 361, 380-84 (1989).

The court below erred by failing to give deference to the reality-based interaction between Congress in the exercise of its oversight powers and the Secretary's exercise of executive powers. The three branches of government must work together with reciprocity. *Nixon*, 433 U.S. at 442-43. While this Court has ultimate jurisdiction to decide constitutional questions, each branch of government has the right to determine its powers and that determination is "due great respect." *Id.* The lower court's application of APA standards to the use of home of record data does not show "great respect" on the part of the Judicial Branch for a jointly arrived at decision of the Legislative Branch and the Executive Branch. This is especially true here, where the subject of census and apportionment is explicitly entrusted to Congress by the Constitution.

C. The Court Misunderstood "Home of Record"

The Commerce Department determined that the most accurate method to allocate overseas serving persons was data showing "home of record." The district court claimed that the

data was inaccurate because "home of record" could be chosen for tax reasons. J.S. App. 76-77a. This is simply untrue. Home of record is defined as, "the place recorded as the home of the individual when commissioned, appointed, enlisted, inducted, or ordered into the relevant tour of active duty." *Joint Federal Travel Regulations*, ch. 56, App. A.[17]

Home of record is not used by the Defense Department for the designation of the state to which an employee pays taxes. "Legal residence" is used for taxes. *Department of Defense Military Pay and Allowances Manual*, § 70105 (defining "legal residence," which is to be used for tax purposes).

The Census Bureau specifically rejected using "legal residence" as the primary method of determining a home state for precisely that reason. J.A. at 921.

Home of record represents not the whimsical election of a home state suggested by the district court, but rather the "reflect[ion of] the person's own concept of his or her home State," at the last time this was a matter of choice. Huckabee, *CRS Study*. J.A. at 879.

That home of record best reflects the state the service member thought of as home before entering the military is made clear by military form (DD 1966). The instructions tell applicants to provide the address "declared by you to be your permanent or actual home at time of enlistment. *Do not enter a temporary address*." Armed Forces of the U.S., Form DD 1966 (emphasis added).

D. The Federal Uniformed and Overseas Citizens Absentee Voting Act and the Washington State Constitution

In Washington, the right to vote of these persons is constitutionally protected--one does not lose residence for voting purposes by absence in the civil or military service: "[N]o person shall be deemed to have . . . lost a residence by reason

[17] The Washington Constitution (Article VI, Section 4) provides that this home ("residence") is retained for voting purposes through the period of federal service. *Infra*, pp. 22-23.

of his absence, while in the civil or military service of the state or of the United States . . .." Wash. Const. art. VI, § 4; Wash. Rev. Code § 29.01.140 (1971).

In 1986, Congress enacted the Uniformed and Overseas Citizens Absentee Voting Act (Voting Act). 42 U.S.C. §§ 1973ff-1973ff-6. The Voting Act protects the right of overseas citizens, including both military and civilian, to vote in federal elections. It calls for absentee voting by postcard, with the normal state registration requirements waived. 42 U.S.C. §§ 1973ff-1973ff-1.[18]

Congress has specified a procedure for determining in what state the citizen may vote, which bears a striking similarity to that used by Census in determining where to count the citizen for apportionment purposes.

The definition of "absent uniformed services voter" specifically includes the requirement that the voter "is absent from the place of residence where the member is otherwise qualified to vote." 42 U.S.C. § 1973ff-6(1)(A). The absent uniformed services voter is allocated to vote in the place where he or she would otherwise be qualified to vote. As noted above, this conforms with Washington law.

The Census Bureau used an appropriate similar method for allocating overseas citizens to the states. The underlying general principle in locating individuals for census purposes is "usual place of residence." The task facing the Census Bureau in allocating overseas citizens to the various states is how to best implement that concept from the available data.

The Census Bureau reviewed various alternatives. The thoroughly reasonable conclusion drawn was that home of record, the last permanent residence before entering the military, is the best approximation of usual place of residence. *See generally*, Huckabee, CRS Study; J.A. at 872, 882. Home of record data is intended to reflect the self-identification of the individual at the last point in time at which his/her residence is

[18] Congress has reported that as of 1986, over six million voters took part in the predecessor to this program. H.R. Rep. No. 99-765, 99th Cong., 2d Sess. 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2009, 2012.

a matter of choice.

Not only is this concept of self identification basic to the census as a whole, but resembles the determination of Congress (and the states) with regard to voting.

Among the purposes of Congress in enacting the Voting Act was the policy that "U.S. citizens overseas may continue to vote for Federal office even if they have no current address in the United States." H.R. Rep. No. 99-765, 99th Cong., 2d Sess. 6-7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2009, 2010-11. The lack of a current address in the United States therefore did not trouble Congress in the context of allowing overseas citizens to vote in the fifty states. As noted above, Washington similarly protects those rights. Wash. Const. art. VI, § 4; Wash. Rev. Code § 29.01.140 (1971). The court below, however, found it "arbitrary and capricious" to afford citizens the same rights when it came to determining their representation in Congress.

The home of record statistics used by the Census Bureau reflect the citizen's chosen state of residence prior to his location being determined by order of the Executive (Commander-in-Chief). For voting purposes, similarly, Congress allowed those overseas to vote in the last state in which they had voluntarily chosen to become qualified.

This similarity of choices supports the conclusion the decisions of the Secretary is not arbitrary or capricious. [19]

III. Refusing to Count Persons Serving the United States (Temporarily) Overseas Violates the Constitutional Rights of Those Citizens and Their States

A. Those Serving Their Country Have a Right to Be Counted

The court's order violates constitutional rights of those U.S. citizens under the equal protection component of the Fifth

[19] It has been previously noted that Congress' record expressions of opinion on the "overseas count" and "home of record" issues were in favor of both (*e.g.*, H.R. 4903, passed House June 26, 1990).

Amendment. The court ordered the Census Bureau to treat residents of the United States abroad on one day, April 1, 1990, differently than those located within the United States, for purposes of determining congressional representation. The remedy is draconian; treat them as nullities for apportionment purposes. The effect lasts ten years.

The court's conclusion is based on the belief that there is no reasonably accurate method for connecting persons temporarily overseas to their state. However, it has already been shown that a reasonable method exists for determining the state of overseas military and federal employees and their dependents and that this home of record is comparable to the federal and state determination of voting place. *Infra*, pp. 17-19. Any census procedure that excludes persons who can be enumerated discriminates on its face because those excluded are thus denied representation in the House of Representatives, as provided by Article I, Section 2 of the Constitution.[20]

The equal protection component of the Fifth Amendment prohibits the federal government from denying equal protection of the laws. *See Bolling v. Sharpe*, 347 U.S. 497 (1954). Census procedures are implemented by the Census Bureau under the authority delegated it by Congress, which the court below conceded has plenary power over census procedures. J.S. App. 74a, *citing* U.S. Const. art. I, § 2, cl. 3.

The Fifth Amendment's equal protection guarantees therefore apply to discriminatory census procedures. Analysis of equal protection under the Fifth Amendment is the same as under the Fourteenth Amendment. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

The equal protection component of the Fifth Amendment is intended to prohibit intentional discrimination by the federal government. *Washington v. Davis*, 426 U.S. 229, 239 (1945).

The facially discriminatory practice at issue in this case is distinguishable from the effect of undercounting at issue in *Tucker v. United States Department of Commerce*, No. 91-2051

[20] The *effect* here of discrimination is to diminish the congressional representation not only of the excluded overseas military, but of their state and its other citizens.

(7th Cir. Mar. 16, 1992). The *Tucker* court held that the undercount claim reflected only an "unintended consequence of measures adopted for reasons unrelated to any intention to discriminate." *Tucker*, slip. op. at 5. Disparate impact alone is not a sufficient basis for a finding of unconstitutional discrimination. *Tucker*, slip. op. at 5 (citing *Washington*, 426 U.S. at 239-45).

Here, however, the measures are intended to treat one group differently from all other persons enumerated by excluding them from apportionment. This exclusion deprives that one group--overseas federal employees and their dependents--of their constitutional right to fair representation in Congress.

Disfranchisement from representation may not be accomplished short of constitutional amendment. Women, children, prisoners, and even aliens have always been counted for purposes of apportionment, even while not entitled to vote. *See* Note, *Constitutional Issues of the Federal Census*, 94 Harv. L. Rev. 841, 847-8 (1981). The original language of Article I, Section 2 excluded from representation only "Indians not taxed" and, by implication, two-fifths of all persons who were slaves. Since adoption of the Fourteenth Amendment following the Civil War, only "Indians not taxed" have been excluded. All other persons are counted and allocated to the states for apportionment purposes. Even illegal aliens are counted and represented. *Federation for American Immigration Reform* (FAIR) *v. Klutznick*, 486 F. Supp. 564 (D.D.C. 1980), *appeal dismissed* 447 U.S. 916 (1980). To treat those overseas on one day differently, when they are capable of being adequately enumerated and counted back to the states, infringes on both a state's right to equal representation based on population, and on each individual's right to fair representation in Congress. It is a particularly egregious violation where the overseas status, and duration, is *ordered* by the United States (the President, as Commander-in-Chief).

Statutes that dilute the effectiveness of some citizens' votes have been held subject to strict scrutiny under an equal protection analysis. *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969); *Reynolds v. Sims*, 377 U.S. 533, 561 (1964). No less rigid standard applies here. Fair representation is

guaranteed to the states and their citizens by the Constitution; thus any infringement on that representation must withstand strict scrutiny. *See Buckley*, 424 U.S. at 94.

Such infringement is constitutional only if it is necessary to promote a compelling governmental interest. *Kramer*, 395 U.S. at 627. While there may be no viable method for finding, counting and allocating to the states all United States citizens traveling abroad on census day, those who are in the military or employees of the federal government, as well as their dependents, can be counted adequately.[21] Those who can be counted, must be counted.

Massachusetts bears the burden of showing that the practice of not counting federal and military employees and their dependents is necessary to achieve a compelling governmental interest.

Moreover, each individual deprived of representation under Massachusetts' scheme has a right to full representation in Congress through their home states. "'[T]he uniform of our county . . . [must not] be the badge of disfranchisement for the man or woman who wears it.'" *Carrington v. Rash*, 380 U.S. 89, 97 (1965) (quoting Governor Arnall's message to the Georgia General Assembly, January 3, 1944). The same may be said of those serving their government as civilians and of dependents.

B. The Constitution Guarantees the States' Representation of all Their Citizens in Congress

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[21] The data relied upon in 1990 is not arbitrary and capricious, nor inherently unreliable as noted above. *Infra*, pp. 17-19, There has never been a perfect census count, *Carey v. Klutznick*, 653 F.2d 732, 735 (1981), and perfection is not required. Here, the agency did not merely repeat its 1970 exercise for obtaining the overseas enumeration, but rather, acted to identify and correct deficiencies in the data available to them, "achiev[ing] the most accurate population count possible in view of the Census Bureau's resources, and the inherent difficulties of the task." *Cuomo v. Baldridge*, 674 F. Supp. 1089, 1093-94 (S.D.N.Y. (1987).

The right to equal representation in Congress, based on population ("persons"), is guaranteed to the states by the Constitution.

Use of the word "persons" in Article 1, Section 2, Clause 3 was vigorously debated during the Constitutional Convention of 1787. Some members sought to limit the apportionment counts to voters, citizens, or landholders. The broader term "persons," which included those not considered part of the body politic, such as women, children, and prisoners. Proponents of the broad term "persons" prevailed. *See* 1 Farrand, *The Records of the Federal Convention of 1787*, 35 ("inhabitants"), 486, 580 (1911); *Pour's Federal and State Constitution* (1878). Following the Civil War, the three-fifths clause was removed by the Fourteenth Amendment. U.S. Const. amend. XIV, § 2. The issue of whom to count was again the subject of considerable, and similar, debate. *See Cong. Globe*, 39th Cong., 1st Sess. (1866). Once again, however, the drafters based representation of the states upon overall population of each state, rather than on a narrower basis, such as number of landholders or voters. *Cong. Globe*, 39th Cong., 1st Sess. (1866); *see also* Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 Fordham L. Rev. 93 (1961).

The history of Article I, Section 2 demonstrates that nothing is more fundamental to our form of government than this principle of equal representation. The Court should give substantial weight to the legislative history of constitution provisions. *See Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("it is in the light of [its] history that we must construe Art. I, § 2 of the Constitution . . . .").

An individual's right to fair representation in Congress is both distinct from, and broader than, the right to vote. Both Congress and the courts have recognized that the "non-voting classes" have a vital interest in the conduct of government. *FAIR*, 486 F. Supp. at 576; *Cong. Globe*, 39th Cong., 1st Sess. 141 (1866) (remarks of Rep. Blaine). That vital interest includes the right to be counted in a state's population for congressional apportionment purposes. *FAIR*, 486 F. Supp. at 576-77 (holding the constitutional requirement of counting "whole number of persons" for apportionment purposes includes illegal aliens).

Under the express language of both Article 1, Section 2, Clause 3 and the Fourteenth Amendment, it has been held that the Census Bureau is required to count all persons and apportion them to the states. *Young v. Klutznick*, 497 F. Supp. 1318, 1332 (E.D. Mich. 1980), *rev'd on other grounds by* 652 F.2d 617 (1981).

Early census procedures reflected the practice of enumerating persons temporarily away from their usual residence. The first census, conducted in 1790, required marshals to "cause the number of inhabitants within their respective districts to be taken." 1 Stat. 101 (1790) ("An Act providing for the enumerations of the Inhabitants of the United States.") The count included as inhabitants "every person occasionally absent at the time of the enumeration, as belonging to that place in which he usually resides in the United States." 1 Stat. 103 (1790). The 1790 census implemented the Framers' understanding that apportionment was to be based on total population.

Madison had stated in 1787, in discussing qualifications for House membership, "both ['resident' and 'inhabitant'] were vague, but the latter least so in common acceptance, and would not exclude persons *absent occasionally for a considerable time on public or private business*." 2 Farrand at 217 (emphasis added).

The constitutional requirement is that all persons be counted in the census for purposes of apportionment. *FAIR*, 486 F. Supp. at 576. Children, prisoners, the mentally incompetent and aliens (including illegal aliens) are counted for purposes of apportionment, even though not entitled to vote. *FAIR*, 486 F. Supp. at 576; *see also* Note, *Constitutional Issues of the Federal Census*, 94 Harv. L. Rev. 841, 847-48, (1981).

To treat those serving abroad as less deserving of representation than convicts or illegal aliens, when they are capable of being adequately enumerated and counted back to the states, infringes on both a state's right to equal representation based on population, as well as those individuals' right to fair representation in Congress.

Massachusetts argues that because these citizens were excluded in 1980, they should be excluded again. However, this

Court has never been persuaded to deny equal protection for reasons "based on exigencies of history or convenience." *New York City Bd. of Estimate v. Morris*, 489 U.S. 688, 703 n.10 (1989); *Reynolds*, 377 U.S. at 579-80. Enumeration methodologies have so far improved in the last decade as to obviate any argument that the practice is historically unsound. The Census Bureau is readily capable of allocating overseas federal and military personnel and dependents to the states for apportionment purposes. Both Article I, Section 2 and the Fifth Amendment's equal protection guarantees require no less.

CONCLUSION

The judgment of the district court should be reversed, the finality of the 1990 Census and Apportionment be confirmed, and judgment be entered affirming the decision of the Secretary to count those serving the country overseas.

Respectfully submitted,

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Certificate of Entitlement

HOUSE OF REPRESENTATIVES

OFFICE OF THE CLERK
WASHINGTON, D.C.

I, Donnald K. Anderson, Clerk of the House of Representatives of the United States, Hereby Certify, Pursuant to the Provisions of Title 2, United States Code, Section 2a (b), That the State of

WASHINGTON

Shall be Entitled, in the One Hundred Third Congress and in Each Congress Thereafter Until a Subsequent Reapportionment Shall Take Effect Under Applicable Statute, to

NINE REPRESENTATIVES

in the House of Representatives of the Congress of the United States.

In Witness Whereof I Hereto Affix My Name and the Seal of the House of Representatives of the United States of America this Sixteenth Day of January, Anno Domini 1991, in the City of Washington, District of Columbia

Donnald K. Anderson.

Clerk of the House of Representatives of the United States

APPENDIX A

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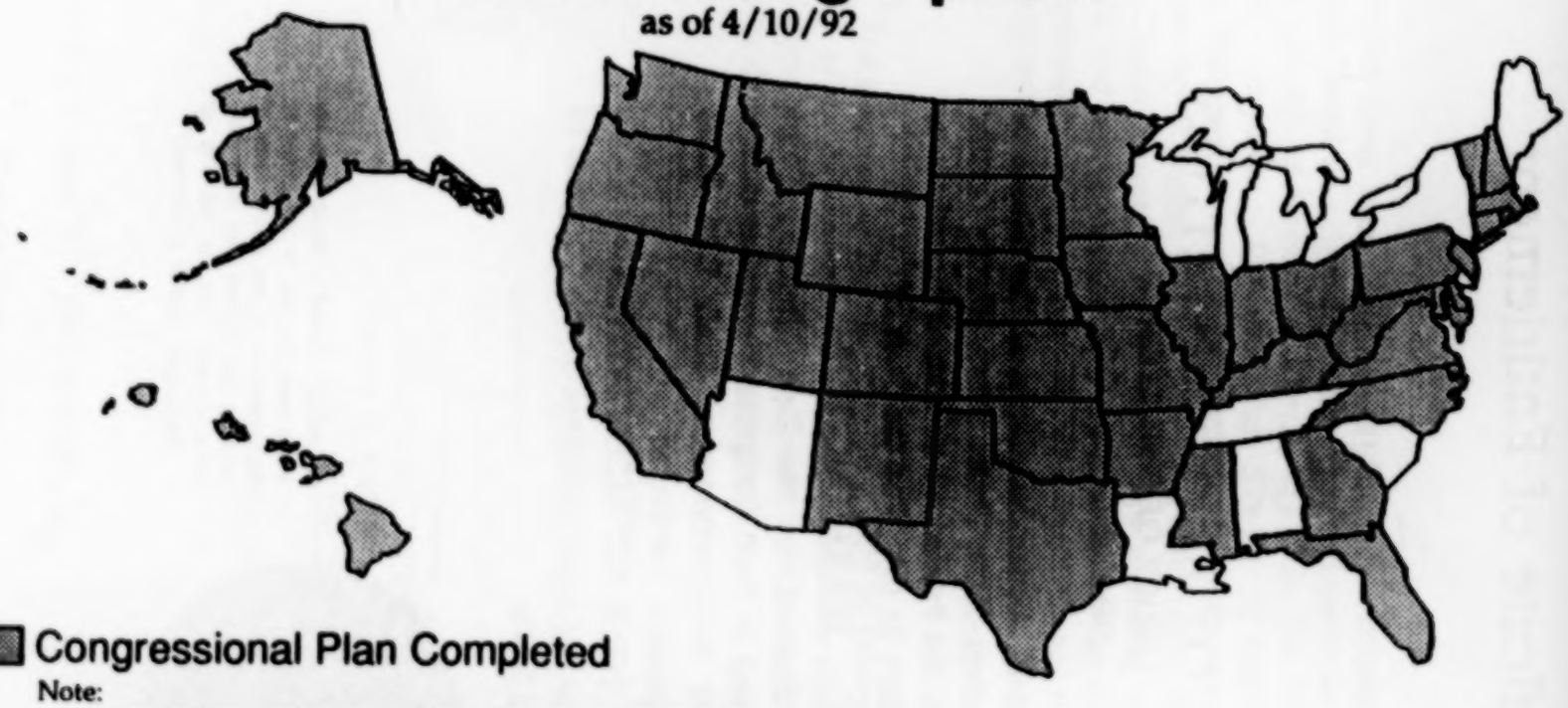
APPENDIX B

Redistricting Update

as of 4/10/92



Congressional Plan Completed

Note:

- Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont and Wyoming have only one congressional seat and are not required to redistrict.

Source: National Conference of State Legislatures (updated)